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### Is the #MeToo Movement for Real? The Implications for Jurors' Biases in Sexual Assault Cases

Mary Graw Leary

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**Is the #MeToo Movement for Real? Implications for Jurors’ Biases  
in Sexual Assault Cases**

*Mary Graw Leary\**

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## INTRODUCTION

Most criminal defendants enjoy a constitutional right to trial by a jury of their peers.<sup>1</sup> This right, long considered a flagship component of the American criminal justice system, is designed to function with other trial rights, to ensure an accused receives a fair trial. By acting as an important buffer between the government and the accused, juries are meant to help prevent government oppression of the people.<sup>2</sup> Such a system hopes to ensure that criminal defendants are treated with dignity and protected from unfair harm. While it is an open debate whether the system is successful in doing so, there is no such debate for victims<sup>3</sup> of sexual crimes. It is abundantly clear that victims of sexual violence are not only traumatized from their initial victimization, but also retraumatized from a criminal justice system in which they have few rights and what rights they have are often honored only in the breach. For decades, research has demonstrated that one of the stages in the criminal justice system at which victims are denied justice most frequently is the trial itself, where juries often mishandle cases of sexual violence.

Juror research demonstrates it is axiomatic that juries judge sexual assault victims more harshly than other witnesses, base their verdicts on perceptions of the victim and not evidence, and contribute to the attrition<sup>4</sup>

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1. U.S. CONST. amend. VI.

2. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (“Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence.”); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (“Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”).

3. The preferred term for those who have experienced sexual violence is “survivor,” not “victim.” However, since this Article focuses on the revictimization of these survivors in the criminal justice system, it uses the terms “victim” and “survivor” interchangeably. *See, e.g., Key Terms and Phrases, RAPE, ABUSE, & INCEST NAT’L NETWORK*, <https://www.rainn.org/articles/key-terms-and-phrases> [<https://perma.cc/DBJ3-VTSQ>] (last visited Sept. 12, 2020). To be clear, however, these individuals are more than their victimization and are survivors.

4. Attrition rates generally refer to the rate sexual assault cases “drop out” of the criminal justice system between the time of the victimization through to the termination of the case. *See, e.g., Barbara Krahé & Anja Berger, A social-*

that sexual violence cases experience from the time the offense occurs to trial. Research indicates this attrition occurs for many reasons, but much of it stems from misinformed societal norms, perceptions of women generally, and sexual assault victims in particular. These norms and perceptions have long plagued access to justice for victims. Although some social stereotypes have diminished and some legal reforms have affected sexual crimes, the attrition of these crimes as they proceed through the justice system continues.

In 2017, however, a social movement commenced that has the potential to afford such victims an authentic voice in criminal trials and to achieve justice. The #MeToo movement gained staggering momentum from a tweet and evolved into a worldwide acknowledgement of the sexual harassment and violence that many women experience on a daily basis and of the profound effects that such experiences have on their lives. With hundreds of thousands of women worldwide openly discussing their victimization, these women contributed not only to an international dialogue regarding the realities of sexual harassment and assault, but also to an international movement.

Such a movement, if long lasting, could have implications for the American jury system. This movement seeks to increase awareness of the depth and scope of sexual harassment and assault. If the movement is successful in this endeavor, then the resultant awareness will influence potential jury pools. Such a transfer of knowledge could increase awareness of the realities of sexual assault and, therefore, correct misinformation regarding “real rape” victims, ultimately leading to a minimization of the effects that bias, rape myths, and rape culture have on verdicts.

In 2020, Harvey Weinstein, a catalyst for the #MeToo movement, was convicted of two of five sex-crime charges. Accused by over 80 women of sexual assault and harassment, Weinstein symbolized the powerful men who assault women with impunity. Some hailed his partial conviction as a victory for the movement. Others saw ample evidence of the continued use of rape myths to discredit women.

This Article examines the emerging research on the #MeToo movement and its potential effects on the population of potential jurors,

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*cognitive perspective on attrition rates in sexual assault cases*, in SOCIAL PSYCHOLOGY OF PUNISHMENT OF CRIME 335 (Margit E. Oswald, Steffen Bieneck & Jorg Hupfeld-Heinemann eds., 2015); MELISSA S. MORABITO ET AL., OFFICE OF JUSTICE PROGRAMS, DECISION-MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE U.S. I (2019), <https://www.ncjrs.gov/pdffiles1/nij/grants/252689.pdf> [<https://perma.cc/3XA6-LCH5>].

exploring the possibility of improving the jury pool in sexual assault cases.<sup>5</sup> Part I discusses the current problem of attrition in sexual assault cases. Part II examines the substantial body of literature surrounding this attrition and the potential reasons for it. Part III explores the #MeToo movement and reviews the emerging body of research regarding it. Part III also considers whether the movement will impact juries positively or whether the attrition rates based on rape myths, misogyny, and rape culture will continue.

#### I. UNDENIABLE SYSTEMIC ATTRITION IN SEXUAL ASSAULT CASES IN THE CRIMINAL JUSTICE SYSTEM

The criminal justice system has experienced several reform movements over the last several decades. These movements range from sentencing guidelines and bail reform to enhanced trial rights. These reforms often represent efforts to achieve a more just outcome for defendants and other stakeholders in the criminal justice system. As with many institutional changes, some have been more successful than others. What has remained a constant, however, is the criminal justice system's inability to adequately respond to sexual assault crimes, leading to a significant attrition in sexual assault cases such that only a small percentage of sexual assault cases ultimately result in a prosecution or a conviction. This attrition occurs at every point of friction between the victim and the state, including reports to law enforcement, investigations by law enforcement and the prosecution, the prosecution itself, and the verdict by a judge or jury.<sup>6</sup> This Article focuses on the attrition that occurs at the point of prosecutorial discretion and, if the case survives that, the verdict phase. Once sexual assault cases reach a court, juries continue the attrition with lower conviction rates and, as research suggests, with verdicts based on bias rather than evidence. Consequently, scholars have called for continued research into juror decision-making.<sup>7</sup>

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5. Subsequent articles will focus on other effects of the #MeToo movement on sexual assault cases.

6. See, e.g., Kirsty Osborn et al., *Juror Decision Making in Acquaintance and Marital Rape: The Influence of Clothing, Alcohol, and Preexisting Stereotypical Attitudes*, J. INTERPERSONAL VIOLENCE (Apr. 2018).

7. Kimberly Lonsway & Joanne Archibald, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 161 (2012).

### A. Frequency of Sexual Violence

Although the media suggests sexual assault rates are decreasing, that suggestion is not the entire picture. According to statistics from the Department of Justice, violent crime, including rape and sexual assault, decreased from 1994 to 2015, but increased from 2015 to 2018.<sup>8</sup>

Similarly, the Centers for Disease Control reported alarming rape rates, finding 19.3% of women experience rape in their lifetime and 43.9% of women experiencing sexual violence other than rape during their lifetime.<sup>9</sup> Regarding sexual harassment, the EEOC found that half of the women in the workforce reported unwanted sexual advances, and a majority of women regarded sexual assault as a serious issue, yet 75% of women did not report it primarily because of fear of retaliation.<sup>10</sup> The Pew

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8. RACHEL E. MORGAN & BARBARA A. OUDEKERK, BUREAU JUST. STAT. CRIMINAL VICTIMIZATION, 2018 1, 3, 15 (2019), <https://www.bjs.gov/content/pub/pdf/cv18.pdf> [<https://perma.cc/G7H9-JF8L>] [hereinafter 2018 *NCVS Report*]. Rape is defined in this survey as coerced, forced sexual intercourse involving penetration. *Id.* at 24. Sexual assault is defined separately from rape to include attacks (actual or threatened) of unwanted sexual contact without force. *Id.* at 24. FBI statistics reflect a similar trend with rape rates increasing in recent years. *Crime Data Explorer: United States – Rape*, FBI (2018), <https://crime-data-explorer.fr.cloud.gov/explorer/national/united-states/crime> [<https://perma.cc/P8C2-A2CW>] (last visited Jan. 25, 2020). It is important to note that the definition of rape in the Uniform Crime Report changed in 2013 to no longer be “carnal knowledge of a female forcibly and against her will.” 2018 *Crime in the United States: Rape*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/rape> [<https://perma.cc/XE2P-9R79>] (last visited Jan. 25, 2020). The current definition includes “penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” *Id.* Attempts to commit rape or assault are also included in the statistics presented here; however, statutory rape and incest are excluded. *Id.* Additionally, each survey defines sexual assault and rape differently. Unless otherwise noted, “sexual assault” will be used as an umbrella term to include rape in its various forms and sexual battery.

9. Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, 105 AM. J. PUB. HEALTH 11 (2015).

10. Caitlin Gibson & Emily Guskin, *A majority of Americans now say that sexual harassment is a ‘serious problem,’* WASHINGTON POST (Oct. 17, 2017), [https://www.washingtonpost.com/lifestyle/style/a-majority-of-americans-now-say-that-sexual-harassment-is-a-serious-problem/2017/10/16/707e6b74-b290-11e7-9e58-e6288544af98\\_story.html](https://www.washingtonpost.com/lifestyle/style/a-majority-of-americans-now-say-that-sexual-harassment-is-a-serious-problem/2017/10/16/707e6b74-b290-11e7-9e58-e6288544af98_story.html) [<https://perma.cc/J9V7-359E>]; CHAI R. FELDBLUM & VICTORIA LIPNIC, U.S. EQUAL EMPLOYMENT OPPORTUNITY

Center found that 59% of women experienced unwanted sexual advances or verbal or physical sexual harassment in the workplace and that 85% have experienced sexual harassment both in and out of the workplace.<sup>11</sup> The most common form of rape involves a perpetrator known to the victim.<sup>12</sup> Nevertheless, rape myths and rape culture dispute this finding and lead to improper conclusions and higher attrition rates.<sup>13</sup>

### *B. Attrition in Reporting and Law Enforcement Response*

Measuring the success of the criminal justice system for victims of sexual crimes requires an examination of the ability of the system to successfully prosecute perpetrators. However, at every stage of the process, obstacles impede some sexual assault cases from advancing to the next point in the system. Although this Article focuses on the phase involving prosecutors and jurors, a review of attrition at the other stages of the justice system is instructive.<sup>14</sup> The beginning of a criminal case is the offense itself. Numerous studies have found that victims report only a small portion of cases of sexual assault or harassment, and that number has not changed over time.<sup>15</sup> In 1991 the National Women's Study found that only 16% of sexual assaults were reported to the police, and although that number increased to 19% in 1995, it once again leveled at 16% in 2005.<sup>16</sup>

Rates for reporting sexual harassment mirror these results. In 2016, the EEOC Task Force on Workplace Harassment released a report that

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COMMISSION, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm#\\_ftnref16](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_ftnref16) [<https://perma.cc/PF8X-VTTW>].

11. Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RES. CTR. (Apr. 11, 2018), <https://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/> [<https://perma.cc/W6B7-N72U>].

12. Osborn et al., *supra* note 6, at 2; *Crime Data Explorer*, *supra* note 8.

13. Osborn et al., *supra* note 6, at 2.

14. Subsequent papers will discuss the effect of the #MeToo movement on those other stages of the criminal justice process.

15. The most recent National Crime Victimization Study (NCVS) found the rate of rapes increased, but the reporting rate decreased. The reporting rate for violent crime in 2018 was 42.6%; excluding simple assault, the rate was 49.9%, and the rate for rape was 24.9%. *2018 NCVS Report*, *supra* note 8, at 8. While this is a decrease from a 40.4% reporting rate in 2017, that figure was an aberration questioned by many. *Id.* ("The percentage of rape or sexual assault victimizations reported to the police declined from 40% to 25%, while the percentage of robbery victimizations reported to the police increased from 49% to 63%.")

16. Lonsway & Archibald, *supra* note 7, at 147.

found that gender-based harassment is almost never reported and that the more serious category of sexually coercive actions are only reported 30% of the time.<sup>17</sup>

This pattern of attrition continues regarding the law enforcement response to sexual violence. Whether police investigate a rape allegation often turns on both the characteristics of the victim as well as the subjective beliefs of the law enforcement agents.<sup>18</sup> Scholars have argued this inconsistency is problematic, noting that “there appears to be a consistently widening gap between the number of reports versus arrests for forcible rape, which differs markedly from the pattern seen with other violent crimes.”<sup>19</sup> The reasons for this gap are many, but the core of the gap appears to be a widely held cultural perception of law enforcement that belies the reality of the modern sexual assault victim. A substantial body of research explains that partly due to “widely held cultural perceptions of sexual assault . . . police officers and other members of society are frequently skeptical of reports that do not resemble” this narrative and that contain “high-risk behaviors.”<sup>20</sup>

### *C. Attrition in Prosecution Decisions and Jury Performance*

Any discussion of attrition rates in jury decision-making must include a discussion of attrition in the rates of prosecution as a result of prosecutorial discretion. The decision to prosecute is intertwined with a prosecutor’s expectations of what a jury will decide. Consequently, the attrition of cases at trial directly influences prosecutorial decisions.

This pattern of attrition repeats when a case makes it to the prosecution stage. Although some statistics measure the percentage of cases charged that result in conviction, Kimberly Lonsway challenges that methodology. She suggests that the more appropriate figure to measure is the percentage of actual sexual assaults that end in a conviction, not just the percentage of arrests that end in conviction.<sup>21</sup> Furthermore, she notes that these statistics do not include statutory rape, rape of children, or rape based on

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17. Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. 121, 125 (2018).

18. Gary D. LaFree et al., *Jurors’ Responses to Victims’ Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389 (1985).

19. Lonsway & Archibald, *supra* note 7, at 150; Daniel P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 CRIM. L. & CRIMINOLOGY 1194 (1997) (concluding the “unfounding” rate for rape is approximately four times).

20. Lonsway & Archibald, *supra* note 7, at 152.

21. *Id.* at 155.



incapacitation.<sup>22</sup> Thus, commonly cited conviction rates suppress the real rate of attrition.<sup>23</sup> A review of social science research suggests that 7% to 27% of reported sexual assault cases are charged, and “only 3% to 36% yield some type of conviction.”<sup>24</sup> When recalculated, both statistical and social research suggests that only 5% to 20% of rapes are reported, 7% to 27% of them are prosecuted, and 3% to 26% of those reported result in a conviction.<sup>25</sup> Consequently, only 0.4% to 5.4% of all rapes are prosecuted, and only 0.2% to 5.2% of those will result in a conviction of any kind.<sup>26</sup>

Advocates examined the federal criminal statistics and made the following analysis. The police referred 9 out of every 1,000 sexual assaults to the prosecution, and 5 out of every 1,000 sexual assaults led to a felony conviction. By contrast, police referred 37 out of every 1,000 robberies for prosecution, with 22 out of every 1,000 resulting in a felony conviction. Furthermore, the prosecution received 105 out of every 1,000 assault and batteries, with 41 out of every 1,000 resulting in a felony conviction.<sup>27</sup>

Alaska performed an in-depth study of its sexual assaults in 2015. It found that in 2015, 1,352 felony sex offenses were reported, 225 led to arrests, 159 resulted in a conviction, and 119 of those convictions were at the felony level.<sup>28</sup> However, the state had to qualify these results due to limitations of data as follows:

Despite these caveats, however, it is clear that there is a difference, by an order of magnitude, in the number of sex offense incidents that occur in Alaska every year and the number of people who are held accountable for those incidents; the number of incidents experienced by victims is in the thousands, while the number of convictions is in the low hundreds.<sup>29</sup>

Although the raw number of reports of sexual assault have increased, “research suggests, ‘in virtually all countries where major studies have

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22. *Id.*

23. *Id.* at 155–56.

24. *Id.* at 156 (discussing research compilations from 2005 and 2006).

25. *Id.*

26. *Id.* at 157.

27. *The Criminal Justice System: Statistics, RAPE, ABUSE, & INCEST NAT’L NETWORK*, <https://www.rainn.org/statistics/criminal-justice-system> [https://perma.cc/D4JP-86LB] (last visited Aug. 9, 2020) (compiling data from a variety of federal government reports).

28. ALASKA CRIMINAL JUSTICE COMMISSION, SEX OFFENSES: A REPORT TO THE ALASKA STATE LEGISLATURE 24 (Apr. 5, 2019), <http://www.ajc.state.ak.us/ajc/docs/ar/2019ACJCSexOffensesReport.pdf> [https://perma.cc/PX2P-24BN].

29. *Id.* at 25.

been published, the number of reported rape offences has grown over the last two decades yet the number of prosecutions has failed to increase proportionally, resulting in a falling conviction rate.”<sup>30</sup> Therefore, although researchers recognize that one in five women experience sexual violence, only 5% of sexual assaults result in convictions.<sup>31</sup> Even when police refer a case for prosecution, prosecutors can and often do fail to file charges. Like police, prosecutors also bring to the charging decision their own prejudices and biased perceptions of what a “real rape” victim looks like, how she<sup>32</sup> behaves, how she should behave, and what her character is. Professor Deborah Turkheimer labels this phenomenon the “credibility discount”<sup>33</sup> to describe the practice of failing to believe sexual assault victims based on a prejudice or pre-conceived belief about the accuser.<sup>34</sup> In the context of rape, the relevant prejudice involves possessing stereotypical—and incorrect—views of what a “real rape” victim looks like (virtuous, injured) and how she behaves afterward (immediately reports), beforehand (reserved), and during the rape (fights back). The attrition rate at the prosecution stage, however, is inextricably linked to juries because prosecutors feel the influential effects not only of their own biases, but also of their beliefs in what juries want to see in such a case.<sup>35</sup> Therefore, victims suffer from the prejudice of prosecutors and then again from prosecutors’ speculative beliefs regarding juries’ prejudices. As a result, “prosecutorial decisionmaking transposes the popular acceptance of rape myths into a rationale for declining to pursue charges.”<sup>36</sup> Prosecutors decide to prosecute based on cultural norms about sexuality, heterosexual relationships, and violence.<sup>37</sup>

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30. Lonsway & Archibald, *supra* note 7, at 158 (citing Tamara Rice Lave, *The Prosecutor’s Duty to “Imperfect” Rape Victims*, 49 TEX. TECH L. REV. 219, 230 (2016)).

31. Meagen M. Hildebrand & Cynthia J. Najdowski, *The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Trials*, 78 ALB. L. REV. 1059 (2015).

32. This Article recognizes sexual assault victims across all social categories, including gender. However, because the vast majority of reported victims are female, this Article will use the feminine pronoun.

33. Deborah Turkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PENN. L. REV. 1 (2017).

34. *Id.* at 4.

35. *Id.* at 37–41.

36. Deborah Turkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1159 (2019).

37. Lisa Frohmann, *Convictability and Discordant Locals: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 L. & SOC’Y REV. 531, 533 (1997).

Once a sexual assault victim survives both the crime itself and the social obstacles to reporting, investigating, and allowing a prosecutor to take her case, the final hurdle she faces is daunting. Not only do criminal trials routinely retraumatize sexual assault victims by subjecting them to hostile procedures,<sup>38</sup> but “[a]ttitudes toward rape and rape victims have [also] been a significant barrier to progress in terms of conviction rates.”<sup>39</sup> Dating back to early research on juror decision-making, such scholarship consistently supports this observation. In both qualitative social science research and studies utilizing mock jurors, the evidence has been consistent for over half a century that jurors negatively and unfairly judge certain sexual assault victims to the detriment of justice.

The definitive early research on jury decision-making dates back to 1966, with Harry Kalven and Hans Zeisel’s seminal book *The American Jury*.<sup>40</sup> As part of the University of Chicago jury project, this research was some of the first to examine the jury from both a jurist’s viewpoint and a sociologist’s perspective. It did so by working with over 3,000 judges to review trials and jury verdicts and compare them with judges’ verdicts. The study not only compared whether the judge and jury verdicts in the same cases matched each other, but also recorded commentary from the judges about the cases and the possible bases for the different outcomes.

More specifically, the research examined the tendency of juries in criminal cases involving victims to consider unrelated victim behavior in determining the guilt or innocence of defendants.<sup>41</sup> The study concluded that criminal cases “show a bootstrapping of the tort concepts of contributory negligence and assumption of risk into criminal law.”<sup>42</sup> The criminal law focuses on the question of accountability for those who break the public law, not on apportioning responsibility. Such an apportionment approach, therefore, has no place in a criminal trial in which a jury should decide cases based exclusively on the relevant evidence and law as

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38. LaFree et al., *supra* note 18, at 1; Aníbal Rosario-Lebrón, *Evidence’s #MeToo Moment*, 74 U. MIAMI L. REV. 1, 27, 30 (2019) (“Depending on the defense, the most frequent strategies used include no witnesses, general victim’s character assassination, highlighting that the accused never threatened the victim, and turning victim’s behavior against her.”).

39. Sokratis Dinos et al., *A systematic review of juries’ assessment of rape victims: Do rape myths impact on juror decision-making?*, 43 INT’L J. L., CRIME, & JUST. 36 (2015) (meta-study of research on juror decision-making in sexual assault cases).

40. HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* (1966).

41. *Id.* at 243.

42. *Id.*

instructed to them. Nevertheless, this research found that juries based their verdicts on other matters.

Kalven and Zeisel's findings were particularly pronounced in sexual assault cases, where judges observed that jurors focused on matters extraneous to the cases.<sup>43</sup> In a typical rape case, the jury should determine whether the defendant forcibly engaged in penetration without the consent of the victim. However, the juries' assessments of the facts in many of these cases reflected patterns of holding victims responsible for their attacks as though they assumed some risks or contributed to their victimization.

The study drew distinctions between what it labeled "aggravated rape," referring to cases wherein the victim and defendant were strangers, multiple defendants engaged in the attack, or there was evidence of extrinsic violence, and "simple rape," referring to cases without such factors. The judge and jury disagreed on the verdicts of aggravated rapes in approximately 12% of the cases, but in the simple rape cases they did so 60% of the time. Even in the simple rape cases, when the jury did convict, it was often for a lesser charge, and in only 3 out of 42 of those cases did the jury convict of rape, meaning the likelihood of disagreement between judge and jury in the simple rape cases was almost 100%.<sup>44</sup> One scholar described these findings in *The American Juror* as implying that juries were four times more likely to convict if aggravated rape factors existed than otherwise.<sup>45</sup> The tendency to attribute responsibility for the attacks to victims eclipsed the different verdicts, striking as they are.

The study also found significant assumption-of-the-risk themes in jury verdicts. Although a jury should limit itself to issues such as whether the defendant obtained consent to engage in penetration, the study noted that the jury often:

does not limit itself to that issue. It goes on to weigh the women's conduct in the prior history of the affair. It closely *and often harshly* scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part.<sup>46</sup>

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43. *Id.* at 245.

44. *Id.* at 253–54.

45. Hildebrand & Najdowski, *supra* note 31, at 1051.

46. KALVEN & ZEISEL, *supra* note 40, at 249 (emphasis added). For example, in one case an offender took a victim to an unfrequented road and attacked her, but the jury acquitted and seemed influenced by the fact that the victim previously married and divorced twice. *Id.* at 250.

The study found that jurors will often convict of a lesser offense if given the option, but without the option they will fully acquit a defendant.<sup>47</sup>

This study found that such actions, described as “rewriting the law,” were “taken to a cruel extreme” at times. In cases with clear evidence of aggravated violence, jurors would be lenient to the offender, acquitting defendants where a victim’s jaw was broken in two places and where three offenders kidnapped a girl.<sup>48</sup> Therefore, when jurors adopt an assumption-of-the-risk lens through which to view the evidence, they may convict a defendant of a lesser charge by rewriting the law or, if not given that option, acquit altogether.

The theme of victim responsibility also emerged with a contributory-fault approach to crimes involving victims. Alcohol consumption appeared to preoccupy jurors in a variety of cases involving victims, including robbery and domestic violence. Although a witness or victim’s ability to clearly recount facts is certainly appropriate for jury consideration, in several criminal trials the jury’s focus on alcohol consumption went far beyond such permissive consideration. For example, in one case the prosecution charged an intoxicated driver with negligent homicide after he killed his passenger, and the jury considered the victim’s consumption of alcohol as contributing to his death.<sup>49</sup>

In criminal cases involving a victim, and sexual assault cases in particular, Kalven suggested that juries were less welcoming of governmental interference through the criminal justice system. Juries seemed to conclude that “the victim is disqualified from complaining and there is no cause for intervention by the state and its criminal law.”<sup>50</sup>

Although tempting to conclude that such findings were perhaps a sign of the times in the mid-1960s, subsequent research focusing exclusively on sexual assault and violence against women confirms these findings in more recent decades. In 1985, LaFree conducted a mock-jury study in which he examined jury deliberations in two types of sexual assault cases: (1) those in which the defense was consent or that no sexual assault occurred and (2) those in which the defense conceded the assault but argued misidentification or that the defendant’s responsibility was diminished due to insanity or drug use.<sup>51</sup> The study found that in cases in which the defendant claimed consent or denied any sexual assault, the relevant evidence of injury or the presence of a weapon did not influence the jurors. The perceived character of the victim, however, did influence

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47. *Id.* at 250.

48. *Id.* at 251.

49. *Id.* at 257.

50. *Id.*

51. LaFree et al., *supra* note 18, at 397.

them. More specifically, jurors were less likely to convict if the victim had engaged in sex outside of marriage, drank alcohol, used drugs, or knew the offender—even if briefly.<sup>52</sup> In other words, in cases where consent was the issue, the victim's lifestyle influenced jurors and caused them to doubt the victim.<sup>53</sup> Similarly, when the defense was misidentification and the victim knew the defendant, one would expect the victim's identification of the defendant to be considered more trustworthy. However, researchers found that in those cases the credibility of the identification weakened in the eyes of the jury.<sup>54</sup>

These results remained consistent even when jurors received instructions that they were not supposed to consider such irrelevant factors. LaFree quoted one juror as acknowledging that “[w]e weren’t supposed to judge her as to her past relations, (but) it came out that she was living with her boyfriend of one week. It was hard not to judge her.”<sup>55</sup>

Although LaFree acknowledges that more research is needed regarding jurors’ attitudes in sexual assault cases, his work did seem to confirm Kalven and Zeisel’s work of a generation earlier. He found indicators that jurors who “held conservative notions regarding appropriate behavior for women tended to absolve a defendant of guilt if the victim allegedly violated conservative notions of ‘proper’ female behavior.”<sup>56</sup> Similar research by Temkin and Krahé in 2008 echoed these scholars’ works. That study interviewed British judges and found that many factors cause problems in sexual assault prosecutions. These factors include inappropriate evidentiary decisions by jurors simply because they could not accept that a sexual assault could take place between people who knew each other.<sup>57</sup>

In 2015, Dinos embarked on a meta-analysis of sexual assault research as well as qualitative studies regarding juror attitudes. The mock-juror research demonstrated consistently that jurors based credibility determinations on personal beliefs, rather than on the actual testimony of the victims.<sup>58</sup> These were not just any beliefs, but rather beliefs regarding

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52. *Id.* Some research indicates that victim behavior directly influences whether a jury will convict. *Id.* at 390. Such behavior includes not only relevant behavior, but also whether a victim has a “bad” reputation or whether she is sexually active or promiscuous. *Id.*

53. *Id.* at 400.

54. *Id.* at 399.

55. *Id.* at 401.

56. *Id.*

57. Lonsway & Archibald, *supra* note 7, at 159. The judges also identified poorly prepared prosecutors.

58. Dinos et al., *supra* note 39, at 39.

how “real victims” should behave during or after a sexual assault—even though these beliefs were not accurate understandings of common victim behaviors.<sup>59</sup> Researchers found not only that men were more willing to acquit than women, but also that both men and women “found victims who wore more revealing clothing, or were judged to be less respectable, were significantly more likely to be held responsible for instances of rape.”<sup>60</sup>

A more recent meta-analysis from Osborn and others found similar results. The analysis examined mock-jury experiments in marital and non-marital rape cases. Their literature review found that guilty verdicts increased in marital rape cases when the victim dressed “smartly” rather than casually in court, and intoxicated victims were judged more complicit even when the defendant was more intoxicated.<sup>61</sup> However, Osborn and others also observed in the literature that high levels of hostile sexism or derogatory attitudes toward women lead to victim blaming because complainants were viewed as having seductive control over male defendants.<sup>62</sup> In the experiment, they observed that although most jurors did convict, men who were more accepting of rape myths supported fewer guilty verdicts and shorter sentences.<sup>63</sup> But even “benevolent sexism” and the idealization of women can lead to negative views of victims when they do not conform with gender norms.<sup>64</sup> Similarly, regardless of the facts of the case, married men received significantly shorter sentences in marital rape cases, reflecting juror views that marital rape is “less serious” than acquaintance rape or stranger rape.<sup>65</sup>

Jurors blaming the victim is not unheard of in litigation. In civil suits, jurors often have to apportion blame between the parties. Such apportionment is not appropriate in a criminal case, where a jury is to determine whether a defendant is guilty of a crime, not who else may have some role in the social harm. Nonetheless, psychological research in civil trials sheds some light on why jurors so harshly judge sexual assault victims. Lerner posits that people desire to believe that the world is safe and stable. When confronted with the suggestion that it is not so, jurors may engage in victim blaming to explain the unsafe world and distance themselves from the victim and the risk of harm.<sup>66</sup> This phenomenon is

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59. *Id.*

60. *Id.*

61. Osborn et al., *supra* note 6, at 3.

62. *Id.* at 4.

63. *Id.*

64. *Id.*

65. *Id.*

66. MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* (1990).

known as “defensive attribution” and can manifest in various behaviors, “including derogating the victim, reinterpreting the injury as victim-precipitated.”<sup>67</sup> Robbenwalt and Hans describe the pattern of blaming victims for their own injuries as a strategy for jurors to “maintain a belief in a just world.”<sup>68</sup>

These results reflect longstanding research findings that jurors are consistently influenced by improper factors and give inappropriate weight to them in assessing victim credibility and evidence in sexual assault cases. Perceptions of gender norms, “real rape,” clothing, prior contact with offenders, and views regarding appropriate behavior of women during and after attacks lead to harsh judgments against female sexual assault victims. Such improper influences may supplant more relevant information such as the presence of injury to the victim or the use of weapons.

These improper views affect more than jury decisions. Lonsway and Archabault’s analysis notes that prosecution rates can be affected as well. A prosecutor considers many factors in proceeding with a prosecution. Those reasons include whether the admissible evidence will probably be sufficient to obtain a conviction. Attrition is not necessarily caused by prosecutors’ outdated social values, but rather “by prosecutors’ awareness of jurors’ outdated societal views and [the fact that they] consider that reality in assessing their cases.”<sup>69</sup>

## II. RESEARCH INDICATES MANY REASONS FOR JUROR CONTRIBUTION TO ATTRITION

The reasons for juror-related attrition are many. They include sexism, rape-myth acceptance, rape culture, and others. Regardless of the cause, the effect on attrition has remained constant for decades.

### A. *Bias and Sexism*

Although research regarding juror decision-making remains consistent throughout the decades, scholars posit different possible reasons for this discounting of victim credibility. The basis for these social views could be as simple as sexism. Sexism itself ranges from aggressive to more subtle versions.

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67. VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 40 (2000).

68. JENNIFER K. ROBBENWALT & VALERIE P. HANS, THE PSYCHOLOGY OF TORT LAW 144 (2016).

69. Lonsway & Archibald, *supra* note 7, at 159.



One more subtle form is implicit bias. Much scholarship has been devoted to implicit bias in the context of race; however, this bias can apply to any group. “Implicit biases’ are discriminatory biases based on either implicit attitudes . . . or implicit *stereotypes*—traits that one associates with a particular group . . . [and that] operate[] in areas such as gender . . . .”<sup>70</sup> Such biases activate not only in situations involving split second decision-making, but also in circumstances involving careful review of information, such as juror deliberation.<sup>71</sup> Indeed, various Supreme Court justices have acknowledged the presence of implicit bias in juries.<sup>72</sup> They have also acknowledged ongoing discrimination against women: “[I]t can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination . . . .”<sup>73</sup> As one author noted, “The bottom line is that gender motivated bias and animus is no less present in the U.S. than racial animus.”<sup>74</sup>

Regarding gender, the culture “transmits stereotypes to individuals that we adopt on a deep, unconscious level. Our most commonly held derogatory stereotypes include those that devalue the words of women . . . and other marginalized groups. Once formed, these stereotypes tend to be highly resistant to counterevidence.”<sup>75</sup> Some research suggests that judges and juries generally find male witnesses more credible than female witnesses.<sup>76</sup> Estimates find that 90% of rape victims are female; therefore, there is a substantial burden for access to

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70. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 833 (2012) (citing Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 948–51 (2006)).

71. *Id.* at 834.

72. *Id.* at 836 (citing *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O’Connor, J., dissenting); *Turner v. Murray*, 476 U.S. 28, 41–42 (1985) (Brennan, J., dissenting)).

73. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

74. Sydney Melillo, “*Vegas Rule: Jury Deliberation Edition*”: *Should the 6th Amendment Exception for Alleged Racial Bias in Deliberations Extend to Gender?*, 11 DREXEL L. REV. 705, 730 (2019).

75. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 432–33 (2019).

76. *Id.* (citing Jacklyn E. Nagle et al., *Gender, Smiling, and Witness Credibility in Actual Trials*, 32 BEHAV. SCIS. & L. 195, 203 (2014)).

justice for sexual assault victims.<sup>77</sup> Some defense attorneys exploit the view that female witnesses are less credible than male witnesses. They do so explicitly in sexual assault cases “in order to further a sexist narrative that women are not credible and . . . victims’ accounts are implausible.”<sup>78</sup>

On the other end of the spectrum, such discriminatory views, taken to their extreme, constitute a form of misogyny. Misogyny includes hatred of women and takes “multiple forms such as male privilege, patriarchy, gender discrimination, sexual harassment, belittling of women, violence against women, and sexual objectification.”<sup>79</sup> Such views have led researchers to conclude that a large minority of people are simply predisposed to acquit in rape cases.<sup>80</sup> Furthermore, men who already hold negative attitudes toward women are less likely to convict.<sup>81</sup>

Bias and sexism against women manifest in some way with the fictional creation of the “ideal victim.” This theory of Nils Christie’s applies to different aspects of the criminal justice system.<sup>82</sup> He notes that the ideal victim is “weaker than the defendant, blameless, and morally virtuous.”<sup>83</sup> Professor Taslitz discusses the problem of “patriarchal stories” about rape and gender roles and how they can shape jury deliberations.<sup>84</sup> Jurors expect certain stories that they have seen before in media, and research suggests that they tend to fill in the gaps in a narrative with portrayals from the media that are overly gendered.<sup>85</sup>

### *B. Belief in Rape Myths*

Some scholars have attributed the source of this juror-caused attrition to rape-myth acceptance. Many definitions for rape myths exist both in academia and mainstream psychology. Lonsway defines rape myths as

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77. *Scope of the Problem: Statistics, RAPE, ABUSE, & INCEST NAT’L NETWORK*, <https://www.rainn.org/statistics/scope-problem> [<https://perma.cc/U42U-W9ZZ>] (last visited Jan. 25, 2020).

78. Rosario-Lebrón, *supra* note 38.

79. Kalpana Srivastava et. al, *Misogyny, Feminism, and Sexual Harassment*, 26 INDUS. PSYCHIATRY J. 111 (2017).

80. Dinos et al., *supra* note 39, at 37.

81. *Id.* at 38.

82. Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing, and Resisting Women’s Claims about Sexualized Victimization*, 65 CATH. U. L. REV. 429, 437 (2016).

83. Nils Christie, *The Ideal Victim*, in FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 17, 18 (Ezzat A. Fattah ed., 1986).

84. ANDREW TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 8 (1999).

85. *Id.* at 8–9.

“attitudes and generally false beliefs about rape that are widely and persistently held, and serve to deny and justify male sexual aggression against women.”<sup>86</sup> Burt describes them more generally as “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists.”<sup>87</sup> They can include many different beliefs which Bohner placed into four categories: beliefs that blame the victim, beliefs that excuse the offender, beliefs that doubt allegations of rape, and beliefs that suggest rape only occurs in certain societal groups.<sup>88</sup> While these definitions vary, the rape-myths share certain characteristics: they are false, they justify or excuse perpetrators of sexual aggression against women, and they are grounded in an incorrect belief that “real rape” includes only violent, physical attacks against women by strangers that produce a uniform response from victims. As a result, these myths prejudice women and rape victims.<sup>89</sup> Indeed, this false narrative of “real rape” rests at the core of rape-myth acceptance. Scholars note that these rape myths

define “real rape” as violent, forced sexual assaults that are perpetrated by strangers and which women verbally and physically resist. Yet, rape myths stand in stark contrast to the reality of many actual rapes, and thereby construct a narrative that implies that women are responsible for their own victimization, shifts blame from men to women, and denies or justifies men’s sexual aggression and violence against women.<sup>90</sup>

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86. Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths: In Review*, 18 PSYCHOL. WOMEN Q. 133 (1994).

87. Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217 (1980); *see also* Dinos et al., *supra* note 39, at 37 (discussing “beliefs about sexual aggression which *justify* sexually aggressive behavior”) (emphasis added).

88. Osborn et al., *supra* note 6, at 2; Dinos et al., *supra* note 39, at 37 (citing Gerd Bohner et al., *Rape Myth Acceptance: Cognitive, Affective and Behavioral Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator*, in *RAPE: CHALLENGING CONTEMPORARY THINKING* 17 (M. Horvath & J. Brown eds., 2009)).

89. One scholar placed rape myths into seven categories: (1) she asked for it; (2) a “real rape” did not occur; (3) he did not mean to do so; (4) she wanted it; (5) she lied; (6) rape is trivial; and (7) rape is deviant (and therefore not committed by “normal” people or by a person against another whom he knows). Hildebrand & Najdowski, *supra* note 31, at 1063.

90. *Id.* “[R]ape myths’ concerning marriages drive juror decisions.” Osborn et al., *supra* note 6, at 2.

The complications with acceptance of rape myths extend beyond societal struggles with inequality and discrimination. The negative effects of this acceptance also exceed the problems that arise when members of the population believe falsehoods regarding a social issue. Such negative effects emerge in the criminal justice system, and the “power of rape myths is not mere conjecture; studies have shown that they impact mock jurors and prosecutors.”<sup>91</sup>

Research has established that, because rape myths are by definition grounded in falsehood, the false information inherent in beliefs endorsing these myths influences jurors’ verdicts. LaFree found that jurors who believe that women precipitate rape are less likely to convict an offender.<sup>92</sup> Ellison and Munro’s mock-juror study concluded that “*unfounded assumptions and attitudinal biases*” of jurors preclude accuracy in verdicts.<sup>93</sup> Dinos’s meta-study identified near unanimous support for the conclusion that rape myths affect juror decision-making.<sup>94</sup> For example, in 2011, one phone survey of over 3,000 people found that 40% of those polled believed that rape was the result of only strong sexual desire, that victims were somewhat responsible for their rapes, and that clothing can invite rape.<sup>95</sup> More specifically, 40.2% of those surveyed thought allegations of rape were often false, and a large minority of those polled were simply predisposed to find the defendant not guilty.<sup>96</sup> Professor Taslitz notes that “judges and juries continue to be skeptical of rape, demanding greater proof than for many other types of crimes and demonstrating deep suspicion of victims.”<sup>97</sup>

People who believe in these myths are more likely to interpret facts to fit their preconceived notions about women and sexual assault. Hence, facts such as the use of alcohol prior to the rape and the victim’s

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91. Tamara Rice Lave, *The Prosecutor’s Duty to “Imperfect” Rape Victims*, 49 TEX. TECH L. REV. 219, 230 (2016); see Dinos et al. *supra* note 39, at 46 (conducting a meta-analysis of nine studies and finding that “rape myths have an impact on juror decision-making . . . [but] in the US the effect sizes were smaller [than the UK or Germany] but still statistically significant”).

92. LaFree et al., *supra* note 18, at 391.

93. Louise Ellison & Vanessa E. Munro, *Turning Mirrors into Windows: Assessing the Impact of (Mock) Juror Education in Rape Trials*, 49 BRITISH J. CRIMINOLOGY 363 (2009) (emphasis added).

94. Dinos et al., *supra* note 39, at 37.

95. *Id.*

96. *Id.*; see also Sherry F. Colb, *Difference Between Presuming Innocence and Presuming Victim Perjury with Acquaintance Rape Trials*, DORF ON L. (July 16, 2018), <http://www.dorfonlaw.org/2018/07/the-difference-between-presuming.html> [<https://perma.cc/Y59B-UZ7N>].

97. TASLITZ, *supra* note 84, at 6.

knowledge of the defendant unduly influence individuals who believe rape myths.<sup>98</sup> Men are more likely to believe rape myths than women.<sup>99</sup> Research concludes that “[r]ape myths are significantly related to juror decision-making related to attribution of a guilty verdict.”<sup>100</sup>

Scholars have repeatedly compared the treatment of and requirements placed upon rape victims to those of robbery victims.<sup>101</sup> For example, they note that rape victims are presumed to be untruthful, their identifications of defendants insufficient, and the lack of corroboration condemning. By contrast, robbery victims’ identifications of a defendant are all that are needed to pursue a case. Their character is not assassinated, and their testimony alone suffices.<sup>102</sup> Moreover, their lack of consent is not challenged, whereas a rape victim’s lack of consent is not enough to secure a rape conviction.<sup>103</sup>

Another factor contributing to sexual assault case attrition is the use of these myths by criminal defense attorneys to influence juries and encourage them to give such factors undue weight. Defense attorneys “often attempt to activate rape myths in jurors, by highlighting evidence linking to these prevailing attitudes.”<sup>104</sup> One researcher of juries in rape cases noted that his “trial observation suggests that a major avenue for challenging a complaining witness’s victimization . . . is to encourage jurors to scrutinize her ‘character.’”<sup>105</sup> Professor Rosario-Lebrón notes as follows:

These attorneys take advantage of the cultural discounting of victims and the often misunderstood or unknown processes through which victims relate their accounts of abuse. By discrediting victims, defense lawyers benefit from adjudicators’ integrative processing. When jurors are unable to reconcile a victim’s actual behavior with imaginary or cultural narratives about SGBV [or sexual- and gender-based violence] crimes and how a victim ‘should’ act or look, jurors may be more likely to

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98. Dinos et al., *supra* note 39, at 39. Research has found that the closer the relationship between the offender and victim, the more likely juries will acquit. *Id.*

99. Osborn et al., *supra* note 6, at 3; Dinos et al., *supra* note 39, at 38.

100. Dinos et al., *supra* note 39, at 46.

101. See, e.g., TASLITZ, *supra* note 84, at 6–7.

102. *Id.*

103. Luis E. Chiesa, *Solving the Riddle of Rape by Deception*, 35 YALE L. & POL’Y REV. 407, 415–416 (2017).

104. Osborn et al., *supra* note 6, at 3 (citation omitted).

105. LaFree et al., *supra* note 18, at 392.

conclude that the SGBV accounts are false.<sup>106</sup>

This phenomenon was most apparent in the trial of Harvey Weinstein. During cross examination of the victims, defense attorneys repeatedly invoked those myths and engaged in victim blaming. The defense attempted to cross examine one victim about her clothing.<sup>107</sup> They also exploited the myth that “real victims” report and fight back by asking a victim why she did not just ask “tough-guy costars Sylvester Stallone and Robert De Niro for help keeping Weinstein away from her.”<sup>108</sup> Weinstein’s lead counsel publicly stated, “If you don’t want to be a victim, don’t go to the hotel room.”<sup>109</sup> The myth that victims frequently make false accusations was woven throughout the defense’s allegations that all three victims and five prior-bad-act witnesses were lying, and had “acquiesced to sex [with Weinstein] because they thought it would help their careers.”<sup>110</sup> The defense’s closing argument alleged that all the victimized women were sexually promiscuous and at fault. Counsel alleged that they regretted their relationships with defendant and “regret [was] renamed as rape.”<sup>111</sup> Counsel further placed blame directly on the victims by asserting that they lived in a world in which “[t]hey’re not responsible for the parties they attend, the men they flirt with, the choices they make to further their own careers.”<sup>112</sup> These tactics reflect a core feature of rape myths: that victims are ultimately responsible for their attacks.

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106. Rosario-Lebrón, *supra* note 38, at 27.

107. Lauren Aratani, *Protests and a witness’s dress: key moments from Weinstein’s trial*, GUARDIAN (Mar. 11, 2020, 11:16 AM), <https://www.theguardian.com/film/2020/feb/24/harvey-weinstein-trial-key-moments> [<https://perma.cc/CSJ7-CX3D>].

108. Michael R. Sisak & Tom Hays, *Week 4 of Weinstein trial: Closing arguments, two universes*, ASSOCIATED PRESS (Feb. 15, 2020), <https://apnews.com/fd8a8a91f722c3adb604bdfb2d69c7da> [<https://perma.cc/C29Z-9ED5>].

109. Elizabeth Blair, *A Profile of Donna Rotunno, Harvey Weinstein’s Attorney*, NAT’L PUB. RADIO (Jan. 20, 2020, 5:06 AM), <https://www.npr.org/2020/01/22/798392179/a-profile-of-donna-rotunno-harvey-weinsteins-attorney> [<https://perma.cc/V7PF-HNTH>].

110. Sisak & Hays, *supra* note 108.

111. Laura Newberry & James Queally, *Harvey Weinstein is ‘an innocent man,’ defense says at closing argument of New York trial*, L.A. TIMES (Feb. 13, 2020, 2:35 PM), <https://www.latimes.com/california/story/2020-02-13/weinstein-trial-closing-arguments> [<https://perma.cc/4DVN-65D7>].

112. *Id.*

*C. Rape Culture*

Some research suggests that rape culture is a contributing factor to the low conviction rate for sexual crimes. Although not unrelated, the term “rape culture” refers to a concept distinct from rape myth. “Rape culture” describes a climate wherein sexual violence is perceived to be common. It is also one in which the predominant social messaging and media “normalize, excuse, tolerate, or even condone sexual violence.”<sup>113</sup> The use of misogynistic language and the objectification<sup>114</sup> of women perpetuate rape culture. Furthermore, rape culture promotes a climate in “which sexual violence is tolerated, accepted, eroticized, minimized, and trivialized.”<sup>115</sup>

The prevalence of rape myths and rape culture has remained stable over time.<sup>116</sup> Society has a steady diet of the media perpetuating rape myths and sexual objectification in the mainstream. Research of primetime media found repeated examples of legitimizing rape myths, such as the suggestion that the victim “asked for it.”<sup>117</sup> As one analysis concludes, the “perpetuation of rape myths, sexual objectification of women, and media’s legitimization of sexual aggression and violence against women are pervasive throughout American society.”<sup>118</sup> Consequently, society in general and jurors in particular are given playbooks on how “real rape” victims should behave, and so when they fail to behave accordingly, it negatively affects jurors’ perceptions of victims in court, leading to confirmation bias, selective-evidence processing, and inaccurate not-guilty verdicts.<sup>119</sup> Therefore, these lower conviction rates are, in part, attributable to rape culture and rape myths. This conclusion explains why

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113. See, e.g., *Counseling & Health: Rape Culture*, COLL. SAINT BENEDICT, SAINT JOHN’S UNIV., <https://www.csbsju.edu/chp/health-promotion/sexual-violence/rape-culture> [<https://perma.cc/BL7L-T5UU>] (last visited Jan. 25, 2020).

114. Sexual objectification generally refers to a portrayal of women, their body parts, or their sexuality as only items of sexual utility and separate and apart from the whole person. Hildebrand & Najdowski, *supra* note 31, at 1066.

115. Anastasia Powell & Nicola Henry, *Framing Sexual Violence Prevention: What Does It Mean to Challenge a Rape Culture?*, in PREVENTING SEXUAL VIOLENCE: INTERDISCIPLINARY APPROACHES TO OVERCOMING A RAPE CULTURE 1, 2 (Nicola Henry & Anastasia Powell eds., 2014).

116. Hildebrand & Najdowski, *supra* note 31, at 1065.

117. For a thorough review of the various studies of the perpetuation of rape culture in mainstream media, see *id.* at 1068–69.

118. *Id.* at 1060.

119. *Id.* at 1072–73, 1080; TASLITZ, *supra* note 84, at 8 (discussing the prevalence of rape culture narrative in the mainstream media).

the results of Kalven's jury research have also remained somewhat stable over time.<sup>120</sup>

*D. The Problem of Attrition in Rape Cases Has Remained Constant Despite Legal and Social Change*

Victims of sexual assault continue to encounter obstacles to justice because of juror attrition, notwithstanding legal reforms and social changes. Recently, Deborah Epstein compared the #MeToo and domestic violence movements by noting the shared "credibility discount" that victims face. After decades of "activism, scholarship, and training, women survivors of domestic violence face persistent skepticism regarding both their accounts of abuse and their recitations of harm."<sup>121</sup> The same can be said about victims of sexual violence.

Significant reform of rape laws has occurred since the 1950s. Once the law recognized rape as a crime, it originally categorized rape as a property crime against men. Now it considers it a personal crime of violence to the person raped.<sup>122</sup> Even civil remedies served as redress for the victim's husband, not the victim herself.<sup>123</sup> Original laws regarding rape were rather restrictive and subject to outlier procedures or elements not common in other types of crime, such as a requirement for corroboration or a marital-rape exception. However, by the mid-1970s most states reformed their rape laws to some extent.<sup>124</sup> Such reforms included broadening definitions of sexual assault to include other types of sexual battery and penetration,<sup>125</sup> removing the requirement for corroboration,<sup>126</sup> and adding rape shield laws to preclude unnecessary inquiry into victims' sexual histories.<sup>127</sup> Although the concept of date rape emerged in 1974, it became nationally

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120. Hildebrand & Najdowski, *supra* note 31, at 1062.

121. Epstein & Goodman, *supra* note 75, at 402.

122. LORENNE CLARK & DEBRA J. LEWIS, *RAPE: THE PRICE OF COERCIVE SEXUALITY* (1977).

123. LaFree et al. *supra* note 18, at 391.

124. Julie Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 L. & SOC. REV. 117, 118–24 (1991); see also Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 983–85 (providing an overview of rape reform laws).

125. Dinos et al., *supra* note 39, at 37.

126. LaFree et al., *supra* note 18, at 392.

127. Mary Beard Deming & Ali Eppy, *The Sociology of Rape*, 65 SOCIO. & SOC. RESEARCH 357 (1981).



discussed in the 1980s.<sup>128</sup> Notwithstanding these reforms, marital rape was not illegal in all states until 1993, and today marital-rape loopholes remain in several states.<sup>129</sup>

In addition to legal reforms, relevant social changes occurred as well. Rape crisis centers surfaced throughout the country in the 1970s to service the needs of rape victims.<sup>130</sup> Congress established the National Center for Prevention and Control of Rape in 1976, which funded empirical studies of rape and its effects.<sup>131</sup> Additional resources included the National Sexual Violence Resource Center, state and local advocacy and service organizations for rape victims, and a national hotline for sexual violence.<sup>132</sup>

Social reform movements came to the fore as well. Since as early as the 1960s, the feminist movement advocated for positions condemning rape.<sup>133</sup> Abrams notes that “[t]he anti-rape movement is best understood as a ‘social movement within a social movement.’ It paralleled the civil rights movement, but it was ‘never divorced from the wider context of feminism.’”<sup>134</sup> Different forms of rape, specifically acquaintance rape, emerged in the national dialogue about sexual violence: “Public perception tended to trivialize acquaintance rape as more private, less serious, and less scary, despite emerging data that it was ‘more common’ and ‘just as traumatic.’”<sup>135</sup>

Given the shifting landscape surrounding sexual assault in the form of legal reform, increased social services, and social progression, one would

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128. Jamie R. Abrams, *The #MeToo Movement: An Invitation for Feminist Critique of Rape Crisis*, 52 U. RICH. L. REV. 749, 759 (2018) (citing MARIA BEVACQUA, *RAPE ON THE PUBLIC AGENDA* 154 (2000)).

129. Samantha Allen, *Marital Rape Is Semi-Legal in 8 States*, DAILY BEAST (April 14, 2017, 10:36 AM), <https://www.thedailybeast.com/marital-rape-is-semi-legal-in-8-states> [<https://perma.cc/V6VY-5HHY>].

130. Abrams, *supra* note 128, at 752, 755; LaFree et al., *supra* note 18, at 389.

131. LaFree et al., *supra* note 18, at 390.

132. *About the National Sexual Violence Resource Center*, NAT’L SEXUAL VIOLENCE RES. CTR., <https://www.nsvrc.org/about/national-sexual-violence-resource-center> [<https://perma.cc/VJ5M-6VHS>] (last visited Jan. 26, 2020); *About PCAR*, PA. COALITION AGAINST RAPE, <https://pcar.org/about-us/about-pcar> (last visited Jan. 26, 2020) (founded in 1975); *About RAINN*, RAPE, ABUSE, & INCEST NAT’L NETWORK, <https://www.rainn.org/about-rainn> [<https://perma.cc/9KEE-YJZ6>] (last visited Jan. 26, 2020) (founded in 1994).

133. Abrams, *supra* note 128, at 752.

134. *Id.* at 754 (quoting MARIA BEVACQUA, *RAPE ON THE PUBLIC AGENDA* 27 (2000)).

135. *Id.* at 759 (quoting MARIA BEVACQUA, *RAPE ON THE PUBLIC AGENDA* 155 (2000)).

expect a more informed public and, therefore, a pattern of jury verdicts that does not contribute to the attrition in rape cases. However, rape rates and conviction rates have remained fairly consistent. “Many experts have concluded that the primary reason the legislative reforms have failed to provide changes in criminal justice outcomes is because the laws have changed, but attitudes have not.”<sup>136</sup> Indeed, Professor Taslitz asserts that part of the cause for this difficulty in passing reform includes prosecutors, judges, and defense counsel circumventing legal reforms.<sup>137</sup>

Prosecutors often require corroboration before bringing a case, judges admit evidence of prior sexual conduct as relevant, and defense counsel either ignore rape shield laws or find permissible ways to disparage victims’ characters—a focus on victims’ clothing, the crowd they associate with, their body language. These legal actors do this because they know that juries demand corroboration, speculate about a victim’s character, and hypothesize about motives to lie.<sup>138</sup>

In short, without a social movement to match social perspectives with the actual realities of rape, other reforms will not reach their promise.

### III. THE #MeToo MOVEMENT AND ITS POTENTIAL INFLUENCE ON JURIES

Many individuals have welcomed these legal reforms and societal shifts in conceptualizing sexual violence. People have hailed these changes as improvements in recognizing rape and violence against women. But the predictions of paradigm shifts have proven premature. Although the mainstream media has created the impression that the justice system has improved its response to sexual assault with increased prosecutions and convictions, the statistical evidence does not support this impression.<sup>139</sup> Although the country finds itself in the grips of the #MeToo movement, whether this movement will move the needle on prosecutions of sexual assault and juror attrition is the subject of much debate.

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136. Lonsway & Fitzgerald, *supra* note 86, at 159 (citing Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK L. REV. 467 (2005)); JENNIFER TEMKIN & BARBARA KRAHÉ, *SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE* (2008).

137. TASLITZ, *supra* note 84, at 7.

138. *Id.*

139. *See, e.g.*, Lonsway & Fitzgerald, *supra* note 86.

*A. The #MeToo Movement Defined*

The country is currently in the midst of another social movement, the #MeToo movement. Although many attribute the term “#MeToo” to an October 15, 2017 tweet from actress Alyssa Milano in the midst of the revelation of Harvey Weinstein’s sexual assaults,<sup>140</sup> the term’s origins date back to 2006, when Tarana Burke founded the movement of the same name to work primarily with young African American women who survived sexual violence. It sought to provide them with support, instill the realization they were not alone, and remove the stigma of sexual victimization; hence the “#MeToo” moniker. According to its website:

In 2006, the “me too.” Movement was founded by survivor and activist Tarana Burke. In those early years, we developed our vision to bring resource, support, and pathways to healing where none existed before. And we got to work building a community of advocates determined to interrupt sexual violence wherever it happens. . . . Today, our work continues to focus on a growing spectrum of survivors—young people, queer, trans, the disabled, Black women and girls, and all communities of color. We’re here to help each individual find the right point of entry for their unique healing journey. But we’re also galvanizing a broad base of survivors, and working to disrupt the systems that allow sexual violence to proliferate in our world.<sup>141</sup>

While the initial use of the term began as a grassroots effort, on October 15, 2017, actress Alyssa Milano added fuel to what has now become a global movement. Responding to the major media coverage regarding the many allegations of the sexual misconduct by Hollywood producer Harvey Weinstein, Milano took to Twitter to ask women who were sexually harassed or assaulted to respond with “#MeToo.”<sup>142</sup> The tweet went viral, with thousands of women responding with reflections on their own victimization. As of 2018, the term “#MeToo” had been utilized

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140. Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 3:21 PM), [https://twitter.com/alyssa\\_milano/status/919659438700670976?lang=en](https://twitter.com/alyssa_milano/status/919659438700670976?lang=en) [<https://perma.cc/729E-J4JG>].

141. *History and Inception*, ME TOO., <https://metoomvmt.org/get-to-know-us/history-inception/> [<https://perma.cc/PQ67-DP3U>].

142. Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 3:21 PM), [https://twitter.com/alyssa\\_milano/status/919659438700670976?lang=en](https://twitter.com/alyssa_milano/status/919659438700670976?lang=en) [<https://perma.cc/729E-J4JG>].

over 12 million times.<sup>143</sup> It galvanized complaints of male sexual assault and harassment across all sectors, including politicians, actors, and celebrities. Within one year of the tweet, many women publicly exposed powerful men for sexually assaulting women, and “a modern anti-sexual assault and -sexual harassment movement” began.<sup>144</sup>

Current scholarship surrounding #MeToo regularly refers to it as a “social movement,” but little scholarship offers a precise definition. Many of the descriptors have common themes of a shared narrative of victimization and the empowering effect of sharing that victimization. This, in turn, amplifies the impact of the narrative, clearly linking it to political and legal change. Margaret E. Johnson’s description most closely exemplifies these characteristics:

#MeToo is a narrative movement by people, primarily women, telling their stories of sexual harassment or assault. . . . [It] bring[s] to the surface stories that have been silenced, untold, or overlooked. These narrative collections can and do effectuate gender-justice change by empowering people, changing perspectives, opening up new learning, and affecting future legal and nonlegal outcomes.<sup>145</sup>

Jamie Abrams notes similar themes in her description: “The #MeToo Movement might be understood as a jolt to reinvigorate the systemic political meaning of rape and sexual assault on the public agenda. Some have specifically described the #MeToo Movement as making society aware of the problem of assault, abuse, and harassment . . . .”<sup>146</sup>

Such descriptions explicitly discuss this movement as one that can lead to legal reform by re-educating the public about the realities of sexual assault and its wide scope and by empowering victims to have their voices

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143. Elizabeth C. Tippet, *The Legal Implications of the #MeToo Movement*, 103 MINN. L. REV. 230, 231 (2018) (citing Emma Brookes, *#MeToo founder Tarana Burke: ‘You have to use your privilege to serve other people,’* GUARDIAN (Jan. 15, 2018, 12:57 AM), <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault> [<https://perma.cc/8SL9-7GQF>]).

144. Abrams, *supra* note 128, at 750, 791 (describing the movement as a “media-infused version of consciousness raising”); *see also* Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/L3XU-8XF5>].

145. Margaret E. Johnson, *Feminist Judgements & #MeToo*, 94 NOTRE DAME L. REV. ONLINE 51 (2018).

146. Abrams, *supra* note 128, at 766.

heard. In so doing, this movement aspires to “be quite a political turning point and a decisive moment of upheaval.”<sup>147</sup>

The movement does appear to be a turning point in that the grassroots work and viral hashtag coincided with the publication of aggressive journalism exposing Harvey Weinstein’s serial sexual abuse, harassment, and rape.<sup>148</sup> In 2017, *Time Magazine* named the “Silence Breakers,” those individuals who disclosed their own experiences with sexual abuse, as its Person of the Year.<sup>149</sup>

The #MeToo movement preceded the #TimesUp movement. Although the two are related, they are also distinct. #TimesUp was founded by a group of over 300 women in the entertainment industry—including Reese Witherspoon, Natalie Portman, and Shonda Rhimes—to help create a workplace free of sexual harassment.<sup>150</sup> The movement created a legal defense fund to assist financially needy survivors of workplace sexual harassment and abuse achieve justice.<sup>151</sup> The fund raised \$20 million in under two months online.<sup>152</sup> #TimesUp also has the goal of effecting legislative and policy changes to protect women from sexual harassment and violence in the workplace.<sup>153</sup>

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147. *Id.* at 767; see also Vasundhara Prasad, Note, *If Anyone is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2549 (2018) (“The #MeToo movement has truly been a moment of reckoning for us as a society, and we need to capitalize on this moment to show victims that they are not alone, and that the legal system works to protect them and other victims down the line, should they choose to speak out.”).

148. Alix Langone, *#MeToo and Time’s Up Founders Explain the Difference Between the 2 Movements—and How They’re Alike*, TIME MAG. (Mar. 22, 2018, 5:21 PM), <https://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/> [<https://perma.cc/C7ES-EL3Z>].

149. Stephanie Zacharaech et al., *Time Person of the Year*, TIME MAG. (Dec. 18, 2017), <https://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/34TF-63FV>].

150. Langone, *supra* note 148; see also *Our Story*, TIME’S UP, <https://timesupnow.org/about/our-story/> [<https://perma.cc/4NN8-GVV3>].

151. *Our Story*, TIME’S UP, <https://timesupnow.org/about/our-story/> [<https://perma.cc/4NN8-GVV3>].

152. Daniele Selby, *The Time’s Up Legal Fund Raised \$20 Million in Just One Month*, GLOBAL CITIZEN (Feb. 8, 2018), <https://www.globalcitizen.org/en/content/times-up-legal-defense-fund-donation-millions/> [<https://perma.cc/5DM5-47B2>].

153. Langone, *supra* note 148.

### B. Potential Effects of the #MeToo Movement

History teaches that social movements come and go with a variety of impacts. Some of them result in lasting social change that translates into legal reform, such as the movement to legalize same-sex marriage culminating in the Supreme Court's recognition of that right in *Obergefell v. Hodges*.<sup>154</sup> Other movements become trivial footnotes in history, failing to withstand the test of time, such as the Occupy Wall Street Movement.<sup>155</sup> While in the midst of any movement, however, it is often impossible to determine which type of outcome it will achieve.

This Article concerns juror perceptions. Therefore, measuring impact on juror perception presents a particular challenge, as specific legal reform is not the desired outcome to address the problem of jury attrition. Nor is the desired outcome simply more convictions. Rather, the goal includes verdicts based on the law, instead of misinformation and bias unduly influencing jurors. Part of the problem with juror attrition stems from seemingly intractable rape myths found in the greater society. Therefore, the social impact of movements such as #MeToo are important to consider in assessing whether juror attrition will decrease.

Some experts have argued that the power of the #MeToo movement rests somewhat in what it reveals about sexual assault and harassment. This insight is critical, as the core of juror attrition rests on misinformation, and new, more accurate revelations about sexual assault could impact juries in both a quantitative and a qualitative way. With over 19 million tweets,<sup>156</sup> and the significant profile of victims of sexual assault and harassment, including Olympic athletes, celebrity entertainers, and other

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154. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *see also Gay Marriage*, HISTORY, <https://www.history.com/topics/gay-rights/gay-marriage> [<https://perma.cc/8WFS-9KG6>].

155. Andy Ostry, *The Failure of Occupy Wall Street*, HUFFINGTON POST (Dec. 6, 2017, 12:36 PM), [https://www.huffpost.com/entry/the-failure-of-occupy-wal\\_b\\_1558787](https://www.huffpost.com/entry/the-failure-of-occupy-wal_b_1558787) [<https://perma.cc/XN3K-S68M>] (“The Occupy ‘movement’ . . . has spiraled into irrelevance and relative obscurity. And it’s a shame, as much of its message had broad resonance which could’ve been harnessed into significant power and influence in Washington.”). *But see* Michael Levitin, *The Triumph of Occupy Wall Street*, ATLANTIC (June 10, 2015), <https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/> [<https://perma.cc/CYC8-8GYC>] (arguing that the movement triggered a longer lasting discussion about economic inequality).

156. Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RES. CTR. (Oct. 11, 2018), <https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/> [<https://perma.cc/7VBK-M9ZD>].

high-profile women, society can see the widespread nature of sexual violence. Such revelations can demonstrate that perceptions of “real rape” and “real rape victims” are part of a false narrative, as the sheer number and diversity of victims support what the research indicates concerning the insidious prevalence of sexual violence in all levels of society.

The movement possesses an important qualitative aspect as well. The nature of the disclosures and the power of the collective disclosure demonstrate the severe and devastating effects of sexual violence.<sup>157</sup> These survivors have verbalized on a massive scale the human toll that such trauma can have on one’s life. More specifically, the #MeToo movement amplified revelations of the “painful truth that women and men have remained silent about rape, sexual assault, and sexual harassment for decades.”<sup>158</sup> This reality dispels the myth that rape is not serious and illustrates that failure to disclose is more common than not. Similarly, Professor Tuerkheimer suggests that the movement could dispel the erroneous beliefs that victims are not to be believed or that there are many false claims of rape: “With more and more accusers coming forward . . . it becomes exceedingly difficult to sustain the proposition that most accusations are false.”<sup>159</sup>

The movement arguably also reveals some shortcomings in the realm of workplace harassment and sexual violence and of the legal responses to them. Prior to #MeToo, it was common to protect or retain executives guilty of sexual harassment or worse, especially if they had a positive impact on the financial health of the given business.<sup>160</sup> Since the movement, more employers see the need to act upon allegations earlier. Therefore, “part of the power of the #MeToo and #TimesUp movements” is that now “employers understand that negative publicity resulting from a failure to take action against a sexual harasser can have a devastating impact on their bottom lines.”<sup>161</sup> Additionally, with the revelation of the prevalence of non-disclosure agreements, the #MeToo movement has exposed how the law can be manipulated to further enable sexual

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157. See Tippet, *supra* note 143, at 212.

158. Abrams, *supra* note 128, at 768.

159. Turkheimer, *supra* note 36, at 1181.

160. For example, Fox News settled several cases against their leading celebrity, Bill O’Reilly, and their CEO, Roger Ailes, paying millions to their victims. Doug Stanglin, *Report: Fox Kept Bill O’Reilly Despite \$32M Sexual Harassment Settlement*, USA TODAY (Oct. 22, 2017, 3:12 PM), <https://www.usatoday.com/story/news/2017/10/21/report-bill-oreilly-struck-sexual-harassment-deal-january-former-fox-analyst/787360001/> [https://perma.cc/DS2M-TWXS].

161. Mizrahi, *supra* note 17, at 134.

harassment.<sup>162</sup> As these agreements disappear, jurors could hear the testimony of more victims describing defendants' prior bad acts.<sup>163</sup> Such witnesses may powerfully influence the jurors' perspectives of survivors.

There is great potential for lasting legal impact as well. Professor Tippettt argues that the #MeToo movement "particularly when combined with shifts in judicial interpretations and legal reforms, stands to have a lasting effect on employer disciplinary practices."<sup>164</sup> Many states have, in fact, engaged in legal reform efforts around the use of non-disclosure agreements, including banning such agreements in addition to non-disparagement clauses and arbitration requirements.<sup>165</sup> Others, however, see the awareness that the #MeToo movement raises as not translating to legal change. Abrams cautions that such awareness will have no lasting impact until more comprehensive changes to social norms occur and society eliminates its pervasive rape culture.<sup>166</sup>

### *C. Potential Effects on the Jury Attrition Problem in Sexual Assault Cases*

To put it colloquially, society has been here before—and nothing happened. In 1991, the country was glued to its televisions to watch Anita Hill testify before Congress about workplace sexual harassment.<sup>167</sup> Although that event sparked a national discussion about such workplace climates, 25 years later the country reacted to the #MeToo revelations with shock and disbelief.<sup>168</sup> These reactions occurred notwithstanding the fact that the Anita Hill hearings substantively displayed both a workplace culture that encouraged harassment and the harsh treatment of harassment victims who seek relief.<sup>169</sup> Similarly, in 2011 the first of several reports of rampant sexual assault in the military surfaced, prompting Congress to

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162. Tippettt, *supra* note 143, at 234.

163. FED. R. EVID. 404.

164. Tippettt, *supra* note 143, at 236.

165. *Id.* at 245, 271.

166. Abrams, *supra* note 128, at 792.

167. Sarah Pruitt, *How Anita Hill's Testimony Made America Cringe—And Change*, HISTORY (Apr. 2, 2019), <https://www.history.com/news/anita-hill-confirmation-hearings-impact> [<https://perma.cc/Z8LY-VU4V>].

168. Epstein & Goodman, *supra* note 75, at 401.

169. Michael S. Rosenwald, *Rewatching Joe Biden's Disastrous Anita Hill Hearing: A Sexual Harassment Inquisition*, WASHINGTON POST (Sept. 18, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2017/11/24/rewatching-joe-bidens-disastrous-anita-hill-hearing-a-sexual-harassment-inquisition/> [<https://perma.cc/FK54-USY2>].



pass legislation intended to guard against retaliation toward victims who allege sexual assault. However, in 2019 the Department of Defense reported a sharp increase in sexual assault.<sup>170</sup> Although this increase could be a positive sign that victims in the military are more willing to report sexual assaults, it also reflects the real possibility that sexual assault in the military continues to be a problem that disproportionately affects women. Despite what appears to be significant social awakening, little substantive improvement has occurred. Professor Epstein's explanation for this stalemate speaks not only to the status quo, but also to the jury attrition problem: "The broader culture stopped listening, relapsing into a long-standing tendency to trivialize women's experiences of abuse at the hands of powerful, predatory men."<sup>171</sup>

The potential remains, however, that the #MeToo movement may have a positive effect on attrition in sexual assault cases. Although research has not concluded that the #MeToo movement will directly affect jury trial verdicts per se, there are tangible avenues for it to make a difference. These avenues include influencing society at large. Such influences will, in turn, translate into influencing the jury pool, the evidence and criminal procedures implemented at trial, the law enforcement investigations and prosecutorial decisions, and jury verdicts themselves. The effects on prosecutors are especially important, as they will enhance and strengthen cases presented to juries.

### *1. Societal Influences*

As Professors Epstein and Goodman state, essential to addressing these issues is a shift in societal norms. Society's understanding of the depth and realities of the harm and trauma caused by sexual violence, rather than the myths surrounding such issues, determines these societal norms. Additionally, social norms affect jury decision-making. Expectations about sexual assault, reporting patterns, acquaintance rape, the use of intoxicants to facilitate rape, and the effect of trauma are social normative views. Indeed, if the general population becomes educated on these issues, it might reject rape myths about reporting and other equally false myths, in order to focus on the evidence of the crime, not on the victim as judged against a false narrative. If society adequately educates

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170. Patricia Kime, *Despite Efforts, Sexual Assaults Up Nearly 40% in Military*, MILITARY.COM (May 2, 2019), <https://www.military.com/daily-news/2019/05/02/despise-efforts-sexual-assaults-nearly-40-us-military.html> [https://perma.cc/SW6E-7U3N].

171. Epstein & Goodman, *supra* note 75, at 402.

its members, then when serving on a jury, jurors will be less influenced by such false myths surrounding sexual violence.

For example, although much research demonstrates that jurors hold delays in reporting against a victim, “[t]he #MeToo Movement powerfully revealed the harsh reality that many women are not able to reveal their victimization for decades or years for a myriad of reasons.”<sup>172</sup> An informed jury, armed with that knowledge, will focus on more relevant evidence and do their analysis without giving undue weight to improper considerations. Research demonstrates that “social norms shape jurors as well.”<sup>173</sup> Social norms around sexual violence are no exception. Therefore, #MeToo must do more than increase public awareness—it must challenge social norms surrounding sexual assault.

In contrast, however, some surveys suggest a negative effect of #MeToo on societal perceptions. *The Economist* reported that one year after the #MeToo movement, the percentage of Americans who thought that false allegations of sexual assault were a larger problem than unreported and unpunished attacks increased from 13% to 18%.<sup>174</sup> To imagine that this thought could work its way into juries is not far-fetched. Notably, in the jury selection for Bill Cosby’s 2018 sexual assault trial, the judge asked potential jurors about whether they had “read or seen anything about the #MeToo Movement or the allegations of sexual misconduct in the entertainment industry.”<sup>175</sup> Similarly, the defense asked jurors to set aside “#MeToo feelings.”<sup>176</sup> It is remarkable that legal professionals would question jurors about whether they are aware that sexual assault or harassment victimizes thousands of women, some of whom may hesitate or fail to report their cases. Although research supports the conclusion of widespread sexual victimization, such courtroom questions that suggest

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172. Abrams, *supra* note 128, at 771.

173. *Id.* at 792.

174. *After A Year of #MeToo, American Opinion Has Shifted Against Victims*, *ECONOMIST* (Oct. 15, 2018), <https://www.economist.com/graphic-detail/2018/10/15/after-a-year-of-metoo-american-opinion-has-shifted-against-victims> [<https://perma.cc/RZ5S-TANR>].

175. Angela Helm, *Judge Asks Potential Cosby Jurors about #MeToo Bias*, *ROOT* (Apr. 3, 2018, 4:50 PM), <https://thegrapevine.theroot.com/judge-asks-potential-cosby-jurors-about-metoo-bias-1824295739> [<https://perma.cc/E6SG-22XB>]; see also Melillo, *supra* note 74, at 742–43 (discussing “gender-based animus” in juries).

176. Deanna Paul, *Weinstein Jurors Asked to Set Aside #MeToo Emotions*, *WALL STREET J.* (Jan. 17, 2020, 8:23 AM), <https://www.wsj.com/articles/weinstein-jurors-asked-to-set-aside-metoo-emotions-11579267411> [<https://perma.cc/W2KB-7FEX>].

otherwise ask jurors to put aside supported facts. Knowledge of these facts is seen as a negative for a jury.<sup>177</sup>

It is hard to imagine other types of cases in which jurors will be asked to ignore facts. In future medical negligence cases, jurors will not be questioned on whether they are aware of the coronavirus and struck if they are. This is because knowledge of factual realities is considered negative only with respect to gender-based crimes. Of course, jurors should not base their verdicts on any social movement or biased trend but rather on the evidence before them. In fact, the Cosby jury issued a statement making it clear that they based their verdict on testimony and not the media swirl around #MeToo.<sup>178</sup> Similarly, the Weinstein verdict, which acquitted him of several of the more serious charges and parsed out each charge on each victim, reflected a considered result.

## 2. Influence on Evidence

Ultimately, the judge determines what evidence reaches the jury and what instructions the jury receives.<sup>179</sup> The #MeToo movement can influence both of those decisions and other mechanics of trials.

Relevance initially determines the admissibility of evidence.<sup>180</sup> Special rules of evidence exist to address components common in sexual assault cases, but judges must still regularly make decisions concerning what evidence comes before sexual-assault juries.<sup>181</sup> The #MeToo movement revealed that delays in reporting are common, even in the most

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177. One prosecutor in the rape case against the University of Tennessee football players, A.J. Johnson and Michael Williams, is reported to have asked jurors about the movement, suggesting that potential jurors had an even more negative view of women who accuse celebrities of rape. Jamie Satterfield, *Jurors Polled on Sex in A.J. Johnson Trial*, TENNESSEAN (July 20, 2018). Williams and Johnson were acquitted based on a defense that the victim agreed to have sex with both men. See also *Them Too: Picking A Sexual Harassment Jury Gets Personal*, BLOOMBERG L. (May 16, 2018, 6:22 AM), <https://news.bloomberglaw.com/business-and-practice/them-too-picking-a-sexual-harassment-jury-gets-personal> [<https://perma.cc/7SSA-5MG2>] (quoting attorneys' publicly stated efforts to know jurors' feelings on #MeToo and some defense counsel seeking older jurors who will "take the defensive" and bring some skepticism into the courtroom").

178. Graham Bowley & Matthew Hoag, *Cosby Jury Says Accuser's Credibility, Not #MeToo, Led to Guilty Verdict*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/arts/television/cosby-juror-interview-gma.html> [<https://perma.cc/YX8U-VPHU>].

179. See, e.g., FED. R. EVID. 102.

180. See, e.g., FED. R. EVID. 401.

181. See, e.g., FED. R. EVID. 412, 413.

egregious sexual assaults. It also demonstrated some of the more common behaviors surrounding sexual assault. Moreover, it illustrated how some offenders can victimize multiple women. This information should influence judges in deciding the admissibility of evidence and should educate the jury on the reality of these issues.

The role of the juror is to determine the facts. Therefore, the jury must evaluate the credibility of all witnesses, understand the facts as they unfold, and determine what ultimately occurred. The #MeToo movement illuminated what is and is not relevant. Behavior of sexual offenders with other victims, their efforts to retaliate against victims, and the grooming of victims and those around them is relevant. Therefore, factual and expert evidence putting sexual assaults in context, as well as providing evidence of cycles of violence that can corroborate witness accounts, is relevant and admissible.

Additionally, relevant to victims' credibility as witnesses is the information concerning common reactions to sexual assault. Consequently, it should underscore for trial judges the need for expert witnesses to explain to juries the realities of sexual assault and to dispel rape myths. The #MeToo movement's revelation of the realities of sexual harassment and assault can inform trial judges on what evidence tends "to make a fact more or less probable,"<sup>182</sup> or whether a potential expert witness will help the "trier of fact to understand the evidence or to determine a fact in issue."<sup>183</sup>

Similarly, the #MeToo movement should inform courts about certain jury instructions on how to evaluate evidence. These instructions would include making explicit the purpose of certain testimony. Although the #MeToo movement may not directly affect jurors, it could indirectly affect what evidence reaches the jury and how it reaches them. This change has the potential to minimize the rape myths and rape culture that unduly influence jurors.

### *3. The Influence on Investigations and Prosecutions*

While the attrition rates present at the stages of investigation and prosecution are beyond the scope of this Article, the effect that the #MeToo movement may have on them will indirectly influence juries. As long ago as the Kalven study, judges identified poorly prepared prosecutors as one of the reasons that the judges lamented jury verdicts in

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182. FED. R. EVID. 401.

183. FED. R. EVID. 702.

some sexual assault cases.<sup>184</sup> Similarly, false rape myths and perceptions of credibility that clash with the reality of rape influence poorly trained law enforcement officers to fail to collect adequate evidence for trial. If the #MeToo movement affects these perceptions at the source, then the cases that reach juries will be stronger and will affect juror deliberations.

The #MeToo movement underscored some realities about sexual violence and police investigations. One of them was how traumatic such victimization can be. This trauma is an obstacle in many ways for investigations. The trauma causes a delay in reporting that can contribute to the loss of evidence. Additionally, research demonstrates that traumatic events can negatively affect recall or sequencing of events because of effects of dissociation, PTSD, and other common collateral effects of sexual victimization. Second, trauma can cause victims to decline to participate in litigation and endure revictimization. If police understood that these effects of trauma present obstacles to cases but that sexual assault is a serious violation and demands in-depth investigation, then they would see these obstacles as surmountable and not as reasons to fail to pursue or fully pursue investigations. In the words of an attorney specializing in human trafficking, these sexual assault cases need to be “victim centered, not victim built.”<sup>185</sup> That is to say, the needs of the victim should be a priority of the case; however, the success of the investigation or prosecution should not be placed solely on the shoulders of the assaulted, traumatized victim.

One possible implementation of the above approach is building a case without a victim. This strategy appears in every homicide case, which by definition has no victim-witness. Given the devastating effects of sexual assault on survivors, there is no dispute that the need to respond to this crime as vigorously as homicide is justified.

The #MeToo movement has the potential to provide motivation and direction for law enforcement to more thoroughly proceed with investigations. This applies to prosecutors as well. Building their prosecution strategy on the realities of sexual assault generally, rather than on their own perceptions or societal perceptions, is essential. In so doing, prosecutors will present to the jury the reality of victimization, which juries will recognize because it will mirror the experiences of the millions of women who have said, “Me too.” Moreover, as previously noted,

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184. KALVEN & ZEISEL, *supra* note 40.

185. *Faces of Human Trafficking: The Victim-Centered Case Transcript*, OFF. FOR VICTIMS OF CRIME: TRAINING & TECH. ASSISTANCE CTR., [https://www.ovcttac.gov/views/HowWeCanHelp/includes/Transcript\\_The\\_Victim-Centered\\_Case.cfm/](https://www.ovcttac.gov/views/HowWeCanHelp/includes/Transcript_The_Victim-Centered_Case.cfm/) [<https://perma.cc/L47A-QZHE>] (Anita Alvarez, Cook County Sherri).

societal norms sometimes influence prosecutors' decisions as to whether to proceed with a case. If societal norms shift, then prosecutors will be more willing to proceed with cases without concern for juror bias.

The #MeToo movement is, therefore, an opportunity to move not only societal norms but also investigatory and prosecutorial norms. In so doing, jurors will receive more complete cases and will render verdicts based on evidence rather than biases.

Some preliminary research suggests that the #MeToo movement may have a direct effect on reporting cases of sexual assault. A statistical analysis of reports of sexual assault, conducted during the months after the #MeToo movement began, found an increase in reporting of approximately 7% to 12%.<sup>186</sup> It rests with investigators and prosecutors to translate these complaints to stronger cases put before jurors.

Many individuals have pointed to the conviction of Harvey Weinstein as evidence of the effect of the #MeToo movement on jury trials of rape charges.<sup>187</sup> However, such a conclusion may be premature. It bears mentioning that in 2015 the District Attorney of New York had evidence of Weinstein admitting to sexual battery and still declined to prosecute.<sup>188</sup> The New York District Attorney only charged Weinstein after the #MeToo movement counted over 80 victims. Although convicted, the jury acquitted Weinstein of many of the most serious charges. Nevertheless, the jury did convict him of one rape and one sexual assault charge. Acknowledging his failure to prosecute, the New York District Attorney stated:

I—and I believe many others—have since 2015 learned a great deal. 2017 was a watershed moment for, I think, all of us in America and certainly all of us in law enforcement . . . . We have a much more, I think, dimensional, sympathetic, and better understanding of how victims of sexual assault behave. And that certainly was part of my thinking [as we] made the decision to

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186. Rene Levy & Martin Mattson, *The Effects of Social Movements: Evidence from #MeToo*, SSRN 2, 3 (July 22, 2020), <https://ssrn.com/abstract=3496903> [<https://perma.cc/SV5H-PXMP>].

187. See, e.g., Nisha Varia, *Weinstein Rape Sentence in US Boosts #MeToo Movement*, HUM. RTS. WATCH (Mar. 12, 2020, 12:09 PM), <https://www.hrw.org/news/2020/03/12/weinstein-rape-sentence-us-boosts-metoo-movement> [<https://perma.cc/9NJ7-WE37>].

188. *In Mixed Verdict, Harvey Weinstein Found Guilty of Rape, Sexual Abuse*, NAT'L PUB. RADIO (Feb. 25, 2020, 5:06 AM), <https://www.npr.org/2020/02/25/809161914/in-mixed-verdict-harvey-weinstein-found-guilty-of-rape-sexual-abuse> [<https://perma.cc/DA6H-2AEG>].

charge this case. We have definitely evolved.<sup>189</sup>

#### CONCLUSION

Social movements can change societal norms and perspectives. When paradigm shifts occur culturally, similar shifts can occur within juries, as individual jurors are members of the greater society. Since 2017, American culture has experienced a broad social movement: the #MeToo movement. This movement directly challenges commonly accepted rape myths and biases that are linked to the attrition of sexual assault cases. If sustained, the #MeToo movement should positively affect these entrenched problems and provide more access to justice for sexual assault victims by creating more verdicts based on evidence and not improper biases. The change will occur either directly through a shift in societal norms or indirectly through more informed judges who make evidentiary rulings, more informed law enforcement who investigate cases without bias, and more informed prosecutors who present cases that address such biases. Such will only be the case, however, if societal norms truly adjust, something that has not happened in decades with respect to sexual violence against women.

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189. *Id.*